

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ENDURANCE ENVIRONMENTAL
SOLUTIONS, LLC

and

Case No. 09-CA-273873

TEAMSTERS LOCAL NO. 100, AN
AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Daniel A. Goode, Esq., for the General Counsel.
William G. Miossi, Esq. (Winston & Strawn LLP)
Washington, D.C., for the Respondent.
Julie C. Ford, Esq. (Doll, Jansen & Ford)
Dayton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case remotely using videoconferencing technology on November 17, 2021. Teamsters Local No. 100, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (Local 100 or the Charging Party) filed the charge on March 3, 2021, and a copy was served on Endurance Environmental Solutions, LLC, (the Respondent or the Employer) on March 10, 2021. The Director of Region Nine of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on May 14, 2021, and the amended complaint and notice of hearing (the complaint) on September 23, 2021. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act or NLRA): by making a unilateral decision to install security cameras and other surveillance devices in trucks operated by employees represented by Local 100; by refusing Local 100's requests to bargain over the installation of the security cameras; and by failing to furnish information requested by Local 100 about the cameras. The General Counsel argues, inter alia, that the facts present here warrant overruling the "contract coverage" standard for determining when a party has contractually waived bargaining over an issue, see *MV Transportation*, 368 NLRB No. 66 (2019), and returning to the standard that places the burden on the party asserting

contractual waiver to show that the waiver was explicitly stated, clear and unmistakable, see *Metropolitan Edison Co.*, 460 U.S. 693, 708-709 (1983), *Quality Roofing Supply Co.*, 357 NLRB 789 (2011), *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-811 (2007), and *Johnson-Bateman*, 295 NLRB 180, 184 (1989).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited liability corporation with principal offices in the State of Illinois and a facility in Florence, Kentucky, that operates trucks that move garbage and refuse. In conducting these operations the Respondent annually performs services valued in excess of \$50,000 in States other than the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

The Respondent operates over-the-road tractor trailer trucks that transport trash to landfill sites. The Respondent has approximately 400 trucks at 22 locations across the United States. This litigation concerns alleged violations at one of those locations, the Respondent's facility in Florence, Kentucky. At that facility, Local 100 represents a bargaining unit of drivers, mechanics and loaders,¹ and the Respondent operates five or six trucks. The Respondent and Local 100 are parties to a collective bargaining agreement (CBA or contract) that was effective by its terms from September 24, 2018, to September 26, 2021.² Local 100 does not represent employees at any of the

¹ The bargaining unit is defined as: All employees including drivers, mechanics and loaders employed by the Employer at its Florence, KY facility, excluding office clerical employees and all professional employees, guards and supervisors as defined in the Act.

² The CBA identifies the employer as K.R. Drenth, which is usually referred to in the record by the initials KRD. On about August 28, 2020, K.R. Drenth was renamed Endurance Environmental Solutions, LLC – which is how it is identified in the complaint's caption. There is no dispute that the Respondent is the successor to K.R. Drenth and that the CBA continued in effect after the name change. Brief of Respondent at Page 3, Footnote 3; Joint Exhibit Number(s) (J Exh.) 2 and 3; Transcript at Page(s) (Tr.) 66-67. The complaint alleges that Endurance Environmental continued as the employing entity, General Counsel Exhibit Number(s) (GC Exh.) 1(k) at Paragraph 5, and, at trial, the Respondent confirmed that Endurance Environmental was the successor to K.R. Drenth and that the two were, in fact, one and the same business. Tr. 66-67. Given this, I refer to the employing entity throughout this decision simply as the Respondent, regardless of whether I am referencing the period when its

Respondent's other facilities, but at three of the Respondent's other facilities employees are represented by other union locals.

B. DECISION TO INSTALL CAMERAS IN ITS TRUCK FLEET

In August 2020, the Respondent decided to purchase a camera system for its entire fleet of about 400 trucks, including those five or six trucks driven by employees represented by Local 100. Transcript at Page(s) (Tr.). 57, 86. The Respondent proceeded to purchase the system for 100 percent of its fleet. Ibid. This camera system includes both cameras directed at the driver and cameras directed outward, and makes both video and audio recordings. Although the cameras record continuously, the system deletes the recordings on an ongoing basis and only preserves what it has recorded if there is a triggering event such as a collision, hard breaking, or a sudden lane change. When triggered by such an event, the camera system retains the video and audio recording of the period starting 10 seconds before the event and ending 5 seconds after the event. The Respondent states that it decided to install the cameras in order to address concerns about liability from accidents and lawsuits, and that it will use the recordings to, inter alia, initiate driver coaching or disciplinary action as appropriate. Tr. 56, 96, 125.

Timothy Montgomery is the only Local 100 business agent responsible for servicing the unit employees at the Florence facility. He testified that the Respondent did not provide Local 100 with notice about the August 2020 decision to install the cameras. Montgomery credibly testified that he did not find out about the decision until approximately 5 months later when, in early January 2021, he heard about it from a unit employee who was also a union steward. The Respondent's only witness, Kevin Blackwell – director of safety since June 2020 – confirmed that the Respondent did not notify Local 100 prior to making the decision to purchase the camera system for the trucks driven by the Local 100 unit members. Tr. 96-97. Blackwell stated that there "wasn't the need to" notify Local 100 because the company had determined that it had the right to make the change unilaterally under a management rights provision in the CBA. Tr. 59, 96-97.

The management rights provision in the CBA states:

The management of the plant and direction of the working force is vested exclusively in the Company, and in furtherance and not in limitation of such authority, shall include the right to assign, to suspend or to terminate employees for just cause, to transfer and relieve employees from duty because of lack of work and for other legitimate reasons, to subcontract bargaining unit work, to make shop rules and regulations, to create new jobs, develop new processes, and implement changes in equipment,

name was K.R. Drenth (KRD) or the period when its name was Endurance Environmental Solutions. I note, however, that the record does not show that, during the time period relevant to the allegations here, Local 100 had been made aware that K.R. Drenth and Endurance Environmental were one and the same business.

changes in the content of jobs or improvements brought about by the Company in the interest of improved methods and product, PROVIDED, that this exercise of management's rights will not violate or supersede any other provisions of this Agreement. The parties acknowledge that, as part of its right to make shop rules and regulations, the Company has the right to issue an employee handbook. The Union acknowledges that the Company provided it with a copy of its most recent draft employee handbook for consideration and bargaining during the collective bargaining negotiations.

Joint Exhibit Number(s) (J Exh.) 1, Pages 4 to 5 (Article III). There is no provision in the CBA that expressly addresses the installation or use of cameras or other recording equipment in the trucks.

Although the Respondent takes the position that it had no obligation to provide Local 100 with notice before making the decision to purchase and install the camera system, it claims that it did, in fact, provide notice to Local 100 in August 2020 shortly after making that decision. I find that the evidence the Respondent presented at trial does not support its contention that this notice was provided. The Respondent relies on an email from Blackwell, dated August 11, 2020, and the attached message, which it characterizes in its brief as "written communication to the entire workforce, including the employees represented by Local No. 100, announcing and explaining the purpose for the installation of the [camera] system." Brief of Respondent at Page 5. However, a review of that email shows that it was not a communication to the entire workforce, but rather an email from Blackwell to the Respondent's terminal managers and regional managers. Respondent Exhibit Number(s) (R Exh.) 2, Tr. 63. Not a single official of Local 100 or even any bargaining unit employee is listed as a recipient. The email tells the managers that the message about the cameras "*can*" be shared with drivers and team members, but does not command such sharing. Perhaps more importantly, the email does not tell managers that they must, or even that they may, share the message with any union representing employees. The Respondent did not present any emails in which one of the original manager-recipients of the announcement forwarded the message to Local 100 or even to any bargaining unit employees at the Florence location. Nor did Respondent call as a witness any manager-recipient who testified that they forwarded, or otherwise communicated, the August 11 message to Local 100 or to the employees it represented. Nor, for that matter, did the Respondent call any unit employees to testify that the August message was shared with them. While Blackwell's email did not direct managers to share the camera announcement with Local 100 or unit employees, Blackwell testified that it was his *expectation* that the managers would share the message with employees. However, Blackwell did not have actual knowledge that any manager, in fact, shared the August message at a single one of its locations, much less that managers did so at *all* of them *including* the Florence location. Moreover, Blackwell's trial testimony about his expectation that the August 11 message was shared with Local 100 employees in August 2020 is undercut by his February 4, 2021, letter to Montgomery, stating that the Respondent "began informing drivers" about the change "*in January*." J Exh. 5 (emphasis added). On the other hand, Montgomery

credibly testified that he had not seen the August 11 message until he was shown it on the day of the November 17, 2021, hearing in this matter. For these reasons, the evidence about the August 11, 2020, message fails to show that, prior to January 2021, the Respondent provided notice of the decision to purchase and install cameras either to Local 100 or even to the employees represented by Local 100.

The other document that the Respondent points to as evidence that it notified Local 100 about its decision to install cameras is a statement that Steven Ruckert – the Respondent’s general manager – made to Blackwell in a series of emails that the two exchanged during the period from August 4 to 17, 2020. In the final email of that 2-week exchange, Ruckert stated, “I called and left a message with the business agent and explained what’s happening. He never called me back so I don’t think it will be an issue.”³ Ruckert did not testify and so the email statement relied upon by the Respondent is hearsay and would generally be inadmissible to prove that Ruckert reached out to a business agent. Fed. Rule of Evid. 801 and 802. The Respondent contends that Ruckert’s hearsay statement should be excepted from the hearsay rule because emails between Ruckert and Blackwell are kept and maintained in the normal course of business and therefore qualify for the business records exception to the hearsay rule. Tr. 73-74; See Fed. Rule of Evid. 803(6). Whether this exception applies to statements in emails such as this one is, as courts have recognized, not certain.⁴

³ The full email chain is set forth in Respondent Exhibit Number(s) (R Exh.) 3. In the first email, dated August 4, 2020, Blackwell asks Ruckert “Is there any kind of notification that we need to give the union to let them know we will be putting cameras in trucks at some point?” Later that day, Ruckert responded, “Yes we have to run this by all of our union divisions This was a very hot topic last go around” In the next email, dated 12 days later on August 16, Blackwell writes to Ruckert, “That letter I sent last week” – referring to the August 11 email to managers, Tr. 106 – “should be enough to satisfy, right?” The next day, August 17, Ruckert responded: “Yes that should be fine. I called and left a message with the business agent and explained what’s happening. He never called me back so I don’t think it will be an issue.”

⁴ See *U.S. v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) (“While properly authenticated emails may be admitted into evidence under the business record exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives emails, then *ergo* all those emails are business records falling within the ambit of Rule 803(6)(B).”), *In re Oil Spill*, 87 Fed. R. Evid. Serv. 492 (E.D. La. 2012), 2012 WL 85447 at * 3 (“[T]here is no categorical rule that emails originating from or received by employees of a producing defendant are admissible under the business records exception,” but rather the party proffering the statement must show, *inter alia*, that it “had a policy or imposed a business duty on its employee to report or record the information within the email.”), *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass 1997) (holding that emails did not qualify for the business records exception where “while it may have been [the employee’s] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained”).

In this instance, the Respondent showed that Ruckert and Blackwell routinely communicated by email regarding business issues and that Blackwell stored the emails on his computer. However, the record does not show that the Respondent “had a policy or imposed a business duty” on Ruckert to report or record the information involved here, or that the Respondent required Blackwell to retain such communications. Moreover, it was not shown that Ruckert sent the email sufficiently close in time to the events his email purports to report. See

However, even if I assume that Ruckert's statement falls within the hearsay exception, I find that it is insufficiently specific and reliable to rebut Montgomery's clear and confident testimony at the hearing that notice about the camera decision was not provided to Local 100 in August 2020, or at any other time before a unit employee alerted Montgomery in January 2021 that the Respondent had announced the decision to employees. I note that Ruckert's email makes no mention of Montgomery or Local 100. Three different unions are present at various Respondent locations, presumably with three different business agents, Tr. 107, but Ruckert states that he left a message for "*the* business agent" – singular. As Blackwell conceded, the email does not provide a basis for surmising whether the business agent who Ruckert says he contacted was Montgomery as opposed to a business agent for one of the other union locals. *Ibid*. Moreover, in the email, Ruckert does not disclose the content of the message he left other than to say he "explained what's happening." Even if Ruckert left some sort of message for Montgomery – and the email leaves that very much in doubt – there is no way of knowing if the message was sufficiently detailed and clear to notify Local 100 that the Respondent had decided to purchase, and install, cameras without bargaining. Montgomery credibly testified that he had not received a voice mail or phone call from Ruckert. Tr. 36, 129. Moreover, Montgomery testified more generally that the Respondent did not, in August 2020 or at any other time prior to January 2021, provide Local 100 with notice of the decision to install the cameras. Tr. 36. For the reasons discussed above, I find Montgomery's confident sworn testimony that the Respondent did not notify Local 100 of the decision to install cameras far more credible than any contrary implication in Ruckert's email. Cf. *UPMC*, 366 NLRB No. 185, slip op at 48 (2018) (crediting employee's testimony that he did not receive a phone call from dispatcher over the dispatcher's hearsay email statement that the phone call was made).

As of the time of hearing on November 17, 2021, the Respondent had installed the cameras in 80 percent of its trucks, but not in the 5 or 6 trucks driven by the employees represented by Local 100. The Respondent attributes the fact that the cameras have not been installed in those trucks to delays in the delivery of cameras, Tr. 57-58, not to the challenge lodged by Local 100 or to the pendency of the instant litigation. On September 26, 2021, the Respondent and Local 100 began bargaining for a new CBA. During those contract negotiations the parties bargained for a provision relating to the cameras. However, at no point did the Respondent state that it had rescinded the August 2020 decision to install the cameras, and it never agreed to bargain about the cameras prior to the negotiations for a new contract. Tr. 32-33.

Fed. R. Evid 803(6)(A) (business record exception does not apply unless "the record was made at or near the time"); see also *In re Oil Spill*, supra ("First of all, the email must have been sent or received at or near the time of the event(s) recorded in the email.")

C. INFORMATION REQUEST AND BARGAINING DEMAND

In January 2021, a unit member/steward at the Florence facility informed Montgomery that the Respondent was planning to install cameras in the trucks. Montgomery reacted by sending a letter, dated January 12, to Blackwell, which expressed Local 100's "demand to bargain on this matter . . . and that any steps toward implementation . . . cease." In addition, the letter had four numbered paragraphs requesting information about the cameras. J Exh. 4. The only request to which the complaint alleges the Respondent failed to respond properly is Request 4. That request reads:

4. Please state whether surveillance cameras are in use at any other Endurance Environmental facilities and, if so, which facilities. For each such facility, please provide a copy of any applicable policy, collective bargaining agreement provision, memorandum of understanding or other document discussing the use of such cameras.

Although the Respondent provided information in response to the other requests, the Respondent did not provide any documents at all in response to Request 4. Tr. 26, 112-113, 121-122. The Respondent did not, it should be noted, even provide Local 100 with a copy of the announcement describing the cameras that it sent to managers by email on August 11, 2020, and which it now claims constituted notice of the change to "the entire workforce, including employees represented by Local No. 100." See Brief of Respondent at Page 5. Nor did the Respondent provide Local 100 with a statement claiming that one or more of the types of documents listed in Request 4 did not exist.

Blackwell and Montgomery subsequently exchanged letters about the January 12 information request. although those communications did not specifically mention Request 4 or the types of information identified in it. Blackwell's first letter to Montgomery about the request was dated February 4. J Exh. 5. That letter stated that "In January, we began informing our drivers that [the Respondent] had begun the process of installing" the cameras. It went on to state, inter alia, that "[i]n an ongoing process, [the Respondent was] implementing cameras in 100 percent of our fleet," that "the primary function of the cameras is collection of footage in the event of an accident and coaching," and that "no collective bargaining has been deemed necessary up to this point." The letter did not include any statement that the Respondent was willing to accede to Local 100's demands that it bargain and cease any steps towards installing the cameras in the trucks driven by the unit employees. Indeed, Blackwell testified that his letter communicated that the decision to install the cameras had *already* been made. Tr. 114.

Montgomery responded to Blackwell in a letter dated February 12. J Exh. 6. The letter stated that the Respondent failed to notify Local 100 about the change and that deciding to install the cameras without bargaining was a violation of the National Labor Relations Act. The letter also "demand[ed] that [the Respondent] immediately cease all

attempts to implement this program at this location.” It went on to argue that the installation of cameras was a mandatory subject of bargaining that has “the potential to affect job security and, secondarily, infringes on employee privacy.” Montgomery’s February 12 letter characterizes Blackwell’s February 4 letter as a “partial response” to the January 12 letter and states that Local 100 “hereby requests answers to its remaining questions and again specifically demands to bargain.”

Blackwell, in an email dated March 1, responded to Montgomery’s February 12 letter. J Exh. 7. Blackwell discussed some details of how the cameras would work and be used, and also contested the applicability of Board precedent that Montgomery had cited for the proposition that the installation of cameras was a mandatory subject of bargaining. In the letter’s concluding paragraph, Blackwell stated: “Please advise how and when you would like to discuss further.” In a rather strange quirk, the final paragraph of Blackwell’s letter to Montgomery also includes the following sentence, which had a red line through it, but was still present and readable: “In closing, bargaining at the expense of safety cannot be a starting point.” This letter, like Blackwell’s previous one, did not state that the Respondent was willing to bargain or that it would cease steps to install the cameras pending bargaining.

Montgomery testified that he was seeking the information listed in Request 4 so that he could see what other union locals had “agreed to and what they didn’t agree to” regarding the cameras so that he could use that in his bargaining on behalf of Local 100. Tr. 24-25. The Respondent did provide Blackwell’s August 11 message, which it claims was notice to the unit employees, with any management rights provisions other unions had agreed to, or with a single other document sought in Request 4. Tr. 26-27. Blackwell conceded both that Montgomery never withdrew Request 4 and that the Respondent never answered that request directly; not even by representing that no responsive documents existed. Tr. 112-113, 121-122.

ANALYSIS AND DISCUSSION

I. UNILATERAL DECISION TO INSTALL CAMERA SYSTEM

The General Counsel presents alternative legal theories in support of its allegation that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally decided to purchase and install cameras in the trucks driven by Local 100 unit members, and refused Local 100’s demand to bargain over the change. First, the General Counsel argues that under the “contract coverage” standard that the Board adopted in *MV Transportation*, 368 NLRB No. 66 (2019), the Respondent was wrong to conclude that Local 100 had, in the management rights provision of the CBA, waived bargaining over the installation of cameras. In the alternative, the General Counsel argues that the facts present here demonstrate the necessity of jettisoning the *MV Transportation* standard and returning to the prior Board standard that places the burden on the party asserting a contractual waiver to show such a waiver was explicitly stated, clear, and unmistakable. See *Metropolitan Edison Co.*, 460 U.S. 693, 708-709 (1983), *Quality Roofing Supply Co.*, 357 NLRB 789 (2011), *Provena St. Joseph Medical*

Center, 350 NLRB 808, 810-811 (2007), *Johnson-Bateman*, 295 NLRB 180, 184 (1989). For the reasons discussed below, I find that the evidence shows that the Respondent did, in fact, unilaterally decide to purchase and install cameras, and that it refused Local 100's demand for bargaining over the decision and its effects. However, when the parties' CBA is analyzed under the current "contract coverage" standard, I find that the Respondent has shown that it was legally entitled to take those actions because the management rights clause in the CBA gave it authority to make "changes in equipment" unilaterally.

The question of whether to jettison the contract coverage standard and either return to the "clear and unmistakable waiver" standard or adopt another standard is for the Board to decide, not me. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."); see also *Austin Fire Equipment, LLC*, 360 NLRB 1176 fn. 6 (2014).

A. Respondent's Section 10(b) Defense Fails

The Respondent argues that it had no obligation to provide Local 100 with notice and an opportunity to bargain about the decision to install cameras, but also claims that it, in fact, gave Local 100 notice through the announcement that was forwarded to managers on August 11, 2020. In its answer to the complaint the Respondent asserted, as an affirmative defense, that the underlying charge was untimely because it was not filed until March 3, 2021 – over 6 months after the August announcement, and therefore beyond the 6-month charge filing period allowed by Section 10(b) of the Act.⁵ This defense fails because the Respondent has the burden of proving the affirmative defense,⁶ and, as discussed in the above statement of facts, the Respondent has failed to show that Local 100, or even any employee represented by Local 100, received the August 11, 2020, announcement to managers, or was otherwise advised of the Respondent's unilateral camera decision prior to January 2021.⁷ Indeed, the evidence affirmatively shows that Local 100 did not discover that the Respondent had decided to

⁵ Section 10(b) provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board."

⁶ *Midwest Terminals of Toledo*, 365 NLRB No. 158, slip op. at 15-16 (2017), enf'd. 783 Fed.Appx. 1 (D.C. Cir. 2019); *NLRB v. Public Service Electric & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998)

⁷ Conveyance of the August 11 announcement is the only means by which the Respondent contends that Local 100 was notified beyond the charge filing period. The 6-month charge filing period does not begin to run until the charging party has clear and unequivocal notice of the acts alleged to constitute the unfair labor practice. *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366, 367-368 (2005); *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Leach Corp.*, 312 NLRB 990, 991 (1993).

make the change until January 2021 – well within the charge filing period – when the Respondent informed unit employees that it would be installing the cameras, and one of those employees, a union steward,⁸ conveyed the information to Montgomery.

5 B. Respondent Failed to Give Local 100
Notice and an Opportunity to Bargain

10 Section 8(a)(5) of the Act requires an employer to give the employees' union
timely notice and an opportunity to bargain before making a significant change to
employees terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962);
15 *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). As Blackwell admitted at trial,
the Respondent made the decision to purchase cameras and install them in its entire
fleet of trucks in August 2020. Local 100 did not find out about this decision until
January 2021, when a unit employee informed Montgomery about it. Montgomery
20 responded to this revelation by demanding that the Respondent bargain over the
decision. The Respondent's reaction was to acknowledge the change, but to decline to
bargain over it. Specifically, the Respondent told Montgomery that it had started
informing employees in January that it would be installing the cameras, and that the
company had deemed that collective bargaining on the subject was not necessary. At
25 best this was belated notice to Local 100 of a fait accompli that had already been
announced to the affected employees and about which bargaining would be fruitless.
This does not meet the Respondent's obligation to provide a collective bargaining
representative with timely notice and a meaningful opportunity to bargain. *Cascades*
Containerboard Packaging, 370 NLRB No. 76, at 1 n.1 and 15 to 16 (2021) (an
30 employer does not meet its Section 8(a)(5) duty to bargain when it simply announces a
final decision to the union under circumstances that make clear that bargaining would
be fruitless), citing *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994); *Taft Coal Sales*
& Associates, Inc., 360 NLRB 96, 100 (2014) (notice was of a fait accompli, that did not
allow meaningful bargaining, where the union was not notified until after the employer
advised the affected employees), *enfd.* 586 Fed. Appx. 525 (11th Cir. 2014).

35 The Respondent argues that, even though it had no obligation to bargain over
the decision to install cameras, it met any such obligation and that Local 100 through its
actions waived its right to bargain over the decision. It is true that a non-contractual
waiver may be demonstrated by a union's conduct. However, to establish such waiver
the employer must show that it provided the union with a timely and

⁸ The record suggests that the steward himself did not receive notice until January 2021. Even assuming that the steward had received notice earlier, that would not change the analysis with respect to the Respondent's timeliness defense since a steward's knowledge of a unilateral change is not imputed to the union for purposes of triggering the 10(b) period. *Brimar Corp.*, 334 NLRB 1035, fn. 1 (2001). Moreover, the CBA between the Respondent and Local 100 expressly limits the steward's authority to the investigation of grievances, the collection of dues, and the transmission of information authorized by the union or union officers. Joint Exhibit Number (J Exh.) 1 at Page 4 (Article II, Section 6). The CBA provision regarding stewards does not authorize them to receive notice from management about changes to terms or conditions of employment.

meaningful opportunity to bargain and that the union did not attempt to do so. *Taft Coal Sales & Associates, Inc.*, supra; see also *MV Transportation*, 368 NLRB No. 66, slip op. at 2 (in the absence of a contractual waiver, a waiver will still be found if the employer “demonstrates that the union clearly and unmistakably waived its right to bargain over the change”), and *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2272 (2012) (“Waiver of the right to bargain based on a union’s failure to request bargaining will not be found where the union was not given advance notice of the change and/or where the notice presented the change as a *fait accompli*.”) enfd. 796 F.3d 31 (D.C. Cir. 2015), cert. denied 577 U.S. 1217 (2016). The evidence here showed that the Respondent failed to provide Local 100 with a timely and meaningful opportunity to bargain. Moreover, when Local 100 discovered the change in January 2020, not only did it not waive bargaining, but rather it promptly and repeatedly demanded in writing that the Respondent bargain. The Respondent, did not agree to bargain,⁹ but instead stated that it “deemed” that no bargaining was necessary and disputed Local 100’s statement that placing the cameras in trucks was a mandatory subject of bargaining.¹⁰ Under these facts, the Respondent’s

⁹ As discussed earlier in this decision, on September 16, 2021, the parties began negotiating for a successor to the CBA, and as part of those discussions the parties negotiated over the installation of the cameras. That does not change the fact that the Respondent failed and refused to bargain prior to making the decision to purchase and install the cameras and prior to announcing that decision to the affected unit employees. Nor does the subsequent bargaining about the cameras in the context of the CBA negotiations close the period of any violation that might be found since the Respondent did not tell Local 100, or announce to unit employees, that management had rescinded its decision to install cameras in the trucks driven by unit employees. As the Board has noted, “A union must not be forced to commence bargaining from a disadvantageous position, or bargain from a hole, caused by the employer’s unremedied unilateral changes.” *CP Anchorage Hotel*, 370 NLRB No. 83, slip op. at fn. 32 (2021), citing *Covanta Energy Corp.*, 356 NLRB 706, 730 (2011) and *Intermountain Rural Elec. Assn.*, 305 NLRB 783, 789 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

¹⁰ The Respondent’s decision to install cameras that observe employees at work was a mandatory subject of bargaining. The Board has repeatedly affirmed that this is the case, especially where, as here, such observation may be used to discipline unit employees. *Roemer Industries*, 367 NLRB No. 133, slip op. at 8 (2019), enfd. 824 Fed. Appx. 396 (6th Cir. 2020); *National Steel Corporation*, 335 NLRB 747, 747-748 (2001), enfd. 324 F.3d 928 (7th Cir. 2003); *Nortech*, 336 NLRB 554, 568 (2001); *Colgate-Palmolive Company*, 323 NLRB 515, 515 (1997), *Genesee Family Restaurant*, 322 NLRB 219, 225 (1996). The Respondent argues that the installation of its cameras was not a mandatory subject of bargaining because they were not “surveillance” cameras. Assuming that such a distinction is more than a matter of semantics, and that the Board would be inclined to rely on it to determine whether cameras installed in the workplace are a mandatory subject of bargaining, I do not believe that the camera system at-issue here would reasonably be placed in the non-surveillance category. As discussed above, the uncontroverted evidence was that the cameras make video and audio recordings of drivers at work and that the Respondent plans to use those recordings as a basis for disciplining drivers. The Respondent also argues that the cameras were not used for improper surveillance. Brief of Respondent at Page 9. It is true that the record does not show that the cameras were used for unlawful surveillance of unit employees’ protected activities, but whether the cameras discouraged protected activities in violation of Section 8(a)(1) is not an issue here. Rather the issue is whether the Respondent violated Section 8(a)(5) when it decided, without notifying or bargaining with Local 100, to install cameras that would significantly impact unit employees’

defense that it provided timely notice and an opportunity to bargain, but that Local 100 waived bargaining by failing to pursue it, is frivolous.

C. Contract Coverage and the Management Rights Provision

The decision to install cameras in trucks driven by unit employees was a mandatory subject of bargaining, and the Respondent did not provide Local 100 with timely notice or an opportunity to bargain about that decision. Nevertheless, as the Respondent argues, it will not be found to have failed to bargain in violation of Section 8(a)(5) if it shows that Local 100 contractually waived bargaining. In *MV Transportation*, the Board announced that it was adopting a “contract coverage” standard for application to cases “in which an employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining.” 368 NLRB No. 66, slip op. at 11. “Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).” *Ibid.* In the instant case, the Respondent asserts that its CBA with Local 100 included a management rights provision that privileged it to unilaterally decide to install the at-issue cameras in the trucks driven by bargaining unit employees. That management rights provision, which is set forth in its entirety earlier in this decision, does not mention cameras, but does state that the company has the authority to unilaterally “develop new processes, and implement changes in equipment.” The Respondent argues that this language covers its decision to install the cameras unilaterally. The General Counsel counters that the Respondent takes the CBA language about changes in equipment out of context. Specifically, the General Counsel argues that the management rights provision contains language indicating that its application is limited to changes made “in the interest of improved methods and product” and that installing cameras does not concern improved methods and product.¹¹

The Board stated in *MV Transportation* that in considering whether “contract language covers the act in question,” *Ibid.*, it will “examine the plain language of the collective-bargaining agreement to determine whether the action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally,” *Id.* at 2. “In applying this standard,” the Board stated, it “will be cognizant of the fact that ‘a collective bargaining agreement establishes principles to govern a myriad of fact patterns,’ and that ‘bargaining parties [cannot] anticipate every hypothetical grievance and . . . address it in their contract.’” *Id.* at 11. In this case, I find that these standards compel a finding that the Respondent was privileged by the CBA’s management rights provision to “implement a change in equipment” by installing cameras in the trucks without bargaining. Trucks are “equipment” of a trucking company and the installation of cameras in those trucks falls within the plain meaning of making a change to that equipment.

terms and conditions of employment.

¹¹ In the post-hearing briefing no party has asserted that there are CBA provisions, other than the one on management rights, that show that the Respondent had, or lacked, the authority to install the cameras.

The General Counsel's contention that this is not so because the contractual provision also mentions "improved methods and processes" is not in my view persuasive. First, the most reasonable reading of the entire sentence at issue is that "improved methods and product" refers only to the immediately prior item, from which it is not separated by punctuation. In other words, I read "or improvements brought about by the Company in the interest of improved methods and product" as a single item on the list of permissible changes. In the alternative reading suggested by the General Counsel, the phrase limiting the permissible changes to ones made "in the interests of improved methods and product," would apply not only to the language about improvements made by the company, but to the earlier types of changes listed in the same sentence, including the changes in equipment. That reading, however, would lead to nonsensical results. For instance, it would mean that the management rights clause gives the Respondent the right "to terminate employees for just cause," but *only* "in the interest of improved methods and product." Or that the Respondent could "transfer . . . employees from duty because of lack of work" but *only* "in the interest of improved methods and product." That cannot be what the parties intended.

At any rate, even assuming that the General Counsel is correct and that the changes in equipment that the management rights provision authorizes are limited to those that improve methods and product, I think the fairest reading would be that the cameras were installed "in the interest of improved methods and product." For a trucking services company, the operation of its trucks *is* product, and the installation of the cameras, and their use to improve safety is an improvement of its product. Moreover, the use of the cameras is in the interests of improving its "methods" for addressing accidents that occur in the course of its work.

The General Counsel supports its interpretation of the reach of the management rights provision by noting, inter alia, that "[t]he CBA does not include any language specific to the implementation or use of surveillance cameras in Unit employees' trucks." Brief of General Counsel at Page 12. However, in *MV Transportation*, the Board clearly stated that the failure of a contract to enumerate every specific circumstance that falls with a general grant of authority does not show that those specifics are not covered. Rather the Board stated "that 'a collective bargaining agreement establishes principles to govern a myriad of fact patterns,'" and therefore "we will not require that the agreement specifically mention, refer to or address the employer decision at issue." Id. at 11, quoting *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993).¹²

¹² I find that bargaining over the effects of the decision to install cameras also falls within the scope of the management rights provision. Under the "clear and unmistakable" waiver standard applicable to contractual waiver cases prior to *MV Transportation*, the Board had held that an employer was required to bargain over the effects of a change if the management rights provision did not clearly and unmistakably waive effects bargaining. See, e.g., *New York University*, 363 NLRB 470, 474, 363 NLRB No. 48 (2015), *Good Samaritan Hospital*, 335 NLRB 901, 902-903 (2001). I am not aware, however, of cases reaching the same result after the Board abandoned the clear and unmistakable waiver standard in favor of the contract coverage

In reaching this conclusion about how the management rights provision should be applied here under the “contract coverage” standard, it is only fair to note that the parties signed the contract on September 25, 2018 – over a year before the Board’s *MV Transportation* decision abandoned the “clear and unmistakable waiver” standard in favor of “contract coverage.” Therefore, at the time Local 100 agreed to the management rights language it did not know that the Board would interpret that language using the contract coverage analysis, rather than the more restrictive clear and unmistakable waiver language. In *MV Transportation*, however, the Board acknowledged this concern but nevertheless ruled that the new standard would apply retroactively to contracts drafted while the prior Board precedent was in effect. The Board said that, in its view, retroactive application was appropriate because it would not “work a manifest injustice.” *Id.* at 12.

For the above reasons, I must recommend dismissal of the complaint allegations that the Respondent violated Section 8(a)(5) and (1) by making a unilateral decision to install cameras in the trucks operated by employees represented by Local 100 and by refusing Local 100’s requests to bargain over the installation of the security cameras and failing to provide Local 100 with a meaningful opportunity to bargain over the decision and its effects.

II. RESPONDENT VIOLATED SECTION 8(A)(5) BY FAILING TO FURNISH INFORMATION REQUESTED BY LOCAL 100 REGARDING THE CAMERA SYSTEM.

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to properly respond to Request 4 in the written information request that Local 100 made on January 12, 2021. In that request, Local 100 asked the Respondent to “state whether surveillance cameras are in use at any other [Respondent] facilities” and, if so, to state which facilities and for each such facility to “provide a copy of any applicable policy, collective bargaining agreement provision, memorandum of understanding or other document discussing the use of such cameras.” As found above, the evidence shows that the Respondent did not provide any information at all in response to this request, even though it had at least some such information – e.g., the August 11, 2020, announcement and any management rights agreements with other union locals. Nor did the Respondent answer the request by making a contemporaneous representation to Local 100 that any of the information responsive to Request 4 did not exist.

An employer’s obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees’ union upon request, with information relevant to and necessary for the performance of the union’s statutory duty as the employees’ bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Information about the unit employees’ terms and conditions of employment

standard. I find that bargaining over those effects falls within the contract coverage of the waiver in the management rights provision.

is presumptively relevant, see *Beverly Health & Rehabilitation Services*, 328 NLRB 885, 888 (1999), *Samaritan Medical Center*, 319 NLRB 392, 397 (1995), but even if, as here, the requested information is not about unit employees, the employer must provide it upon a showing that the information “has even probable or potential relevance” to the union’s representational duties, see *North Star Steel Company*, 347 NLRB 1364, 1368 (2006), *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1007-1008 (1994), *Pfizer Inc.*, 268 NLRB 916, 918 (1984), *Conrock Co.*, 263 NLRB 1293, 1294 (1982); see also *Acme Industrial*, 385 U.S. at 437 (The question is whether there is a “probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.”).

The record here shows that the Respondent was required to produce the information sought by Local 100 in Request 4 because, while that information was not directly about unit employees, it was of probable or potential relevance to Local 100’s representational duties.¹³ When the Respondent, by letter of February 4, notified Local 100 of its decision to install the cameras it specifically explained its action by stating that it was a company-wide decision – for all 400 trucks in its 22-location operation, and not just for the five or six trucks driven by Local 100 unit members. Since the Respondent explained the decision to install the cameras at the unit employees’ location by reference to the treatment of employees at other locations, the Respondent has itself made that treatment relevant and the particulars of the camera use at other facilities has at least “probable or potential” relevance to what Local 100 could hope to negotiate. Moreover, as the Respondent surely knew, its communication that Local 100 unit members were just a miniscule fraction of the employees affected by a corporate-wide decision, would tend to discourage employees about the prospects for altering the Respondent’s chosen course. As noted in the General Counsel’s brief, when an employer makes representations to a union regarding working conditions at its other facilities, that fact can demonstrate the relevance of union-requested information about those working conditions at other facilities. See *Kraft Foods*, 355 NLRB 753, 755 (2010), and *Caldwell Mfg.*, 346 NLRB 1159, 1159-1160 (2006). Here, Montgomery credibly testify that he hoped the information about other facilities, especially other unionized facilities, would help him understand the range of possibilities of what Local 100 could hope to achieve during bargaining regarding the cameras. In the letter requesting the information, Montgomery informed the Respondent that he was seeking information because the cameras had “the potential to affect job security and, secondarily, infringes on employee privacy.”

In addition, the Respondent represented to Local 100 that it was installing the cameras “companywide . . . but no bargaining has been deemed necessary up to this point.” J Exh. 5. The Respondent has contended, successfully here, that bargaining with Local 100 was not necessary because of the management rights clause in its CBA with Local 100. Local 100’s representation of its members in the face of the Respondent’s claim about the effect of the management rights provision in its CBA

¹³ As previously noted, the Board has held that an employer’s decision to install cameras that observe represented employees is a mandatory subject of bargaining. See, *supra*, footnote 10.

could, at least “potentially” have been assisted by receiving the CBAs that the Respondent had with the other unions. Did those other CBAs contain the same management rights provision as Local 100’s CBA, or did they include no such provision, or did they include other provisions that expressly, or by implication, waived bargaining over the installation of cameras?

Finally, I note that despite my finding that the Respondent’s decision to unilaterally install cameras was authorized by the management rights provision, the January 12, 2021, information request is still relevant to Local 100’s statutory duties because it was, at a minimum, relevant to Local 100’s preparations to negotiate a successor CBA. It is undisputed that the Respondent and Local 100 not only could, but did, bargain about the cameras that year as part of negotiations for a successor CBA. The duty to provide information “extends to the provision of information that is relevant to contract negotiations.” See *Whitesell Corp.*, 357 NLRB 1119, 1160 (2011).

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act since January 12, 2021, by failing to furnish, or inform Local 100 that it did not possess, the information requested by Local 100 in Request 4 of its January 12, 2021, letter.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act since January 12, 2021, by failing to furnish, or inform Local 100 that it did not possess, the information requested by Local 100 in Request 4 of its January 12, 2021, written information request.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁴

ORDER

The Respondent, Endurance Environmental Solutions, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide Teamsters Local No. 100, an Affiliate of the International Brotherhood of Teamsters, AFL-CIO, (Local 100) with requested information, or stating that the Respondent did not possess requested information, relevant to and necessary for the performance of Local 100's statutory duty as the collective bargaining representative of employees in the following bargaining unit:

All employees including drivers, mechanics and loaders employed by the Respondent at its Florence, KY facility, excluding office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide Local 100 with all of the information responsive to Request 4 in the January 12, 2021, letter from Timothy Montgomery to Kevin Blackwell.

(b) Within 14 days after service by the Region, post at its facility in Florence, Kentucky, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 8, 2022



PAUL BOGAS
U.S. Administrative Law Judge

APPENDIX**NOTICE TO EMPLOYEES**

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to timely provide Teamsters Local No. 100, an Affiliate of the International Brotherhood of Teamsters, AFL-CIO, (Local 100) with information it requests that is relevant to and necessary for the performance of its role as your collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly provide Local 100 with all of the information requested in Request 4 of the January 12, 2021, letter from Local 100 business agent Timothy Montgomery to Kevin Blackwell.

**ENDURANCE ENVIRONMENTAL
SOLUTIONS, LLC**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

John Weld Peck Federal Building, 550 Main Street, Room 3003,
Cincinnati, OH 45202-3271 (513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-273873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.